JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–2072 OF 2008
HANIPAH FARIKULLAH JC
1 SEPTEMBER 2010

Insurance — Life insurance — Duty of disclosure — Deceased held MRTA policies from second defendant — Claim under policy — Failure to disclose deceased was suffering from diabetes — Whether there was non-disclosure of material fact by deceased — Whether defendants proved beyond reasonable doubt that deceased had committed fraud — Insurance Act 1963 s 147(4)

On 28 July 2003, Heng Chong Teck ('the deceased') and the first plaintiff had applied for a housing loan from the first defendant to purchase a terrace house. The first defendant's representative ('the bank officer') had advised the deceased and the first plaintiff that they were required to purchase an MRTA policy to cover the life of the deceased. The bank officer had explained to the deceased and the first plaintiff that this policy would ensure that in the event of the demise of the deceased during the period of the housing loan, the insurance company would repay the housing loan. According to the first plaintiff the deceased, who could not read or write English, then signed on a blank MRTA form provided by the bank officer. Subsequently, the deceased received a letter dated 7 November 2003 from Uni Asia Life Assurance Bhd ('the second defendant') informing him that his application in respect of the MRTA policy for the amount of RM367,961 had been approved and was effective from 20 November 2003. On 30 December 2006, almost three years after the MRTA policy had been taken, the deceased died of ischemic heart disease. The joint administrators of the estate of the deceased ('the plaintiffs') wrote to the second defendant insurer requesting the latter to pay the sum insured of RM367,961 but the second defendant repudiated liability on the grounds that the deceased had failed to declare that he had been diagnosed with or treated for diabetes. The plaintiffs thus commenced the present action against the second defendant insurance company for failing to pay the insured sum and the first defendant as the second defendant's agent. The plaintiffs submitted that the first defendant agent had been negligent in its duties when it failed to explain to the deceased the contents of the MRTA policy before the deceased signed the same. The first defendant denied being negligent as alleged by the plaintiffs and submitted that if at all the deceased had suffered any loss, such loss was caused wholly or contributed to substantially by the negligence of the deceased himself by his failure to disclose the material fact that he had been diagnosed with or treated for diabetes. It was the second defendant's case that the deceased had

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

misrepresented a material fact or facts and/or had acted fraudulently when he did not disclose the fact that he was suffering from diabetes since October 2002 in his application for the MRTA policy in October 2003 and that this rendered the policy voidable at the instance of the defendants. In response, the plaintiffs contended that there was no suppression of a material fact and that the deceased was not given the opportunity to disclose his health condition to the bank officer, who did not read out or explain the 'health declaration' in the MRTA policy to the deceased. The two issues to be considered in this case were whether there was a non-disclosure of a material fact by the deceased and whether the defendants had proved beyond reasonable doubt that the deceased had committed fraud.

Held, allowing the claim against the second defendant with costs and dismissing the claim against the first defendant:

(1) It is settled law that an insured's duty to disclose material information to an insurer constitutes a duty which exists independently of any proposal form. Thus in the present case, the deceased bore the duty to disclose the fact that he was suffering from diabetes to the insurer when he signed the MRTA form for a policy cover. Based on the facts of this case, the fact that the bank officer did not specifically ask the deceased whether he had diabetes did not modify in any degree the duty of disclosure on the deceased. As such, the deceased had failed to disclose a material fact to the defendants (see paras 24, 27 & 29)

(2) However, as the policy in the present case had been in force for more than two years, s 147(4) of the Insurance Act 1963 ('the Act') would apply. Under the second limb of s 147(4) of the Act, the second defendant should be precluded from contesting the validity of the policy on the ground of non-disclosure of material facts unless fraud was proven. Based on the totality of the evidence adduced and the authorities cited, the court was not satisfied beyond a reasonable doubt that the deceased had committed fraud. In the present case, although the deceased knew that he was signing an MRTA form, the detailed contents of the form and in particular the warning in it was not read and explained to him. Further, it was found that the bank officer had not specifically asked the deceased whether he had diabetes but had instead asked him whether he had any 'illness or sickness', which was ambiguous and lacked specifics. Since the questions asked by the bank officer were ambiguous, such ambiguity would need to be resolved in favour of the plaintiffs. Thus the second defendant was not entitled to avoid the policy (see paras 30, 31 & 41–46)

[Bahasa Malaysia summary

Pada 28 Julai 2003, Heng Chong Teck ('si mati') dan plaintif pertama telah memohon untuk pinjaman perumahan daripada defendan pertama untuk membeli sebuah rumah teres. Wakil defendan pertama ('pegawai bank')

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

menasihatkan si mati dan plaintif pertama bahawa mereka dikehendaki untuk membeli polisi MRTA untuk melindungi hayat si mati. Pegawai bank telah menjelaskan kepada si mati dan plaintif pertama bahawa polisi ini akan memastikan bahawa jika si mati meninggal dunia semasa tempoh pinjaman perumahan tersebut, syarikat insurans akan membayar semula pinjaman perumahan tersebut. Menurut plaintif pertama si mati yang tidak boleh membaca atau menulis di dalam bahasa Inggeris, telah menandatangani borang MRTA kosong yang diberikan oleh pegawai bank tersebut. Kemudian, si mati menerima sepucuk surat bertarikh 7 November 2003 daripada Uni Asia Life Assurance Bhd ('defendan kedua') memberitahunya bahawa permohonannya berkaitan dengan polisi MRTA untuk jumlah RM367,961 telah diluluskan dan bermula daripada 20 November 2003. Pada 30 Disember 2006, hampir tiga tahun selepas polisi MRTA diambil, si mati meninggal dunia kerana penyakit jantung ischemic. Pentadbir bersama harta pusaka si mati (plaintif-plaintif) menulis kepada penginsurans defendan kedua memohon ia membayar jumlah yang diinsuranskan sebanyak RM367,9761 tetapi defendan kedua membatalkan liabiliti atas alasan bahawa si mati telah gagal untuk mengisytiharkan bahawa dia telah didiagnosis dengan atau diberi rawatan untuk diabetes. Plaintif-plaintif oleh itu memulakan tindakan ini terhadap syarikat insurans defendan kedua kerana gagal membayar jumlah yang diinsuranskan dan defendan pertama sebagai agen defendan kedua. Plaintif-plaintif menghujah bahawa agen defendan pertama telah cuai di dalam kewajipannya apabila ia gagal untuk menjelaskan kepada si mati tentang kandungan polisi MRTA sebelum si mati menandatanganinya. Defendan pertama menafikan kecuaian seperti yang didakwa oleh plaintif-plaintif dan menghujah bahawa jika si mati telah mengalami kerugian, kerugian tersebut adalah disebabkan sepenuhnya atau menyumbang secara substansial oleh kecuaian si mati sendiri kerana kegagalannya untuk mendedahkan fakta material bahawa dia telah didiagnosis dengan atau dirawat untuk diabetes. Ia adalah kes defendan kedua bahawa si mati telah salah representasi fakta atau fakta-fakta penting dan/atau telah bertindak secara fraud apabila dia tidak mendedahkan fakta bahawa dia mengalami penyakit diabetes semenjak Oktober 2002 di dalam permohonannya untuk polisi MRTA pada Oktober 2003 dan ini menjadikan polisi tersebut boleh dibatalkan oleh defendan-defendan. Dalam jawapan mereka, plaintif-plaintif menghujah bahawa tidak ada penyekatan fakta material dan bahawa si mati tidak diberikan peluang untuk mendedahkan keadaan kesihatannya kepada pegawai bank, yang tidak membaca atau menjelaskan 'health declaration' di dalam polisi MRTA kepada si mati. Dua isu yang perlu dipertimbangkan di dalam kes ini adalah sama ada terdapat ketidak pendedahan fakta material oleh si mati dan sama ada defendan-defendan telah membuktikan melampaui keraguan yang munasabah bahawa si mati telah melakukan fraud.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

Diputuskan, membenarkan tuntutan terhadap defendan kedua dengan kos dan menolak tuntutan terhadap defendan pertama:

(1) Ia adalah undang-undang matan bahawa kewajipan pihak yang diinsuranskan untuk mendedahkan maklumat material kepada penginsurans merupakan kewajipan yang wujud secara berasingan daripada apa-apa borang cadangan. Maka di dalam kes ini, si mati mempunyai kewajipan untuk mendedahkan fakta bahawa dia mengalami penyakit diabetes kepada penginsurans apabila dia menandatangani borang MRTA untuk perlindungan polisi. Berdasarkan kepada fakta kes, fakta bahawa pegawai bank tidak secara spesifik menanya si mati sama ada dia mempunyai penyakit diabetes tidak mengubah dalam apa takat pun kewajipan pendedahan ke atas si mati. Oleh demikian, si mati telah gagal untuk mendedahkan fakta material kepada defendan-defendan (lihat perenggan 24, 27 & 29).

(2) Walau bagaimanapun, oleh kerana polisi di dalam kes ini telah berkuat kuasa selama lebih daripada dua tahun, s 147(4) Akta Insurans 1963 ('Akta') akan beraplikasi. Di bawah bahagian kedua s 147(4) Akta tersebut, defendan kedua sewajarnya dihalang daripada mempertikaikan kesahan polisi atas alasan ketidak pendedahan fakta material kecuali fraud dibuktikan. Berdasarkan kepada keseluruhan keterangan yang dikemukakan dan autoriti yang disebut, mahkamah tidak berpuas hati melampaui keraguan yang munasabah bahawa si mati telah melakukan fraud. Di dalam kes ini, walaupun si mati mengetahui bahawa dia menandatangani borang MRTA, kandungan terperinci borang tersebut dan khususnya, amaran di dalamnya tidak dibacakan dan dijelaskan kepadanya. Selanjutnya, didapati bahawa pegawai bank tidak secara spesifik bertanya kepada si mati sama ada di mengalami penyakit diabetes tetapi sebaliknya bertanya kepadanya sama ada dia mempunyai apa-apa 'illness or sickness', yang taksa dan tidak khusus. Oleh kerana soalan-soalan yang ditanya oleh pegawai bank adalah taksa, ketaksaan sedemikian perlu diputuskan memihak kepada plaintif-plaintif. Maka defendan kedua tidak berhak untuk mengelak polisi tersebut (lihat perenggan 30, 31 & 41–46).]

Notes

For cases on duty of disclosure for life insurance, see 8 *Mallal's Digest* (4th Ed 2011 Reissue) paras 193–197.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 1 AMR 665; [2001] 2 CLJ 133, FC (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45; [1997] 1 CLJ 497, FC (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

Asean Security Paper Mill Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 MLJ 301; [2007] 2 AMR 329; [2007] 2 CLJ 1, FC (refd)
Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330, HC (folld)
Azizah bte Abdullah v Arab-Malaysian Eagles Sdn Bhd [1996] 5 MLJ 569, HC (folld)
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34; [1985] 1 LNS 134, SC (refd)
Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd, CA [2009] 5 AMR 488 (refd)
Goh Chooi Leong v Public Life Assurance Co Ltd [1964] MLJ 5, HC (refd)
Goh Hooi Yin v Lim Teong Ghee [1990] 2 CLJ 48 (Rep) (refd)
Lau Kee Ko & Anor v Paw Ngi Siu [1974] 1 MLJ 21, FC (refd)
Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627; [1996] 2 BLJ 356, HC (refd)
Lee Teck Seng v Lasman Das Sundra Shah [2000] 8 CLJ 317, HC (folld)
Malaysia Assurance Alliance Bhd v Chong Nyuk Lan (Administrator of the Estate of Liew Kin On, deceased) [2002] 6 MLJ 648; [2003] 5 CLJ 245, HC (refd)
Maxi Development Sdn Bhd & Ors v Allianz General Insurance Malaysia Bhd [2011 1 MLJ 654; [2010] 4 AMR 704 (folld)
'Melanie' United Oriental Assurance Sdn Bhd Kuantan, The v WM Mazzarol [1984] 1 MLJ 260, FC (folld)
Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2008] 5 MLJ 128; [2008] 2 AMR 407; [2008] 3 CLJ 692, CA (refd)
Saminathan v Pappa [1981] 1 MLJ 121; [1980] 1 LNS 174, PC (refd)
Saunders v Anglia Building Society [1971] AC 1004, HL (folld)
Tan Guat Lan & Anor v Aetna Universal Insurance Sdn Bhd [2003] 1 MLJ 430; [2003] 5 CLJ 384, HC (refd)
Toh Kim Lian & Anor v Asia Insurance Co Ltd [1996] 1 MLJ 149, HC (folld)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 AMR 553 ; [2005] 3 CLJ 229, FC (refd)

Ho Kee Tong (Gan, Ho & Razlan Hadri) for the plaintiffs.
Christopher K F Foo (Ooi Syn Chieh with him) (Raja, Darryl & Loh) for the first defendant.
Yudistra Darma Dorai (Collin and Andrew with him) (Chooi & Co) for the second defendant.

Hanipah Farikullah JC:

[1] The first plaintiff is the lawful wife of Heng Chong Teck, deceased and the first plaintiff and the second plaintiff are the joint administrators of the estate of Heng Chong Teck, the deceased. The first defendant is a licensed financial institution. The second defendant is a licensed insurance company. The plaintiffs claim against the defendants for damages suffered as a result of

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

breach of insurance policy No 11518 under Master Policy No EGS 10148 by the defendants. The defendants refused to pay on the grounds that there was a material non-disclosure and the plaintiffs had fraudulently failed to disclose a material fact that he was suffering from diabetes.

BACKGROUND FACTS

[2] On 30 December 2006 the first plaintiff's husband ('the deceased') died of ischemic heart disease. The plaintiffs furnished proof of the death of the deceased and requested the said sum of RM367,961, but the defendants repudiated liability on the ground of non-disclosure of a material fact by the deceased in the MRTA policy form dated 28 July 2003. The plaintiff sued the defendants for the said sum being the insured amount for the housing loan and interest thereon.

THE PLAINTIFF'S CASE

[3] The first plaintiff, Tan Mooi Sim ('PW1') testified that on 28 July 2003, the deceased and her attended to the office of the first defendant for the purpose of applying for a housing loan to finance the purchase of one unit of two storey terrace house. The deceased and PW1 were informed by the Wong May Cy ('DW1'), a personal banking @ officer of the first defendant that they were required to purchase an MRTA policy to cover the life of the deceased so that in the event the deceased pass away during the period of the housing loan, the housing loan will be paid by the insurance company. Subsequently PW1 said that the deceased was given a blank MRTA policy form by DW1 and the deceased signed the blank form as he could not read and write in English. PW1 informed the court that DW1 did not go through and explain in detail the contents of the MRTA form to the deceased before he signed the blank form.

[4] According to PW1, vide a letter dated 7 November 2003, the second defendant informed the deceased that his application in respect of the MRTA policy for the amount of RM367,961 had been approved and effective on 20 November 2003.

[5] It is an agreed fact that on 30 December 2006, almost three years after the MRTA Policy was taken, the disease died of ischemic heart disease while playing volleyball. The plaintiffs furnished proof of the death of the deceased and requested the sum of RM367,961 from the second defendant but vide a letter dated 11 December 2007 the second defendant repudiated liability on the ground that the deceased failed to disclose material facts in the proposal form in respect of the deceased health condition that he was suffering from diabetes since 2002.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

[6] Hence the plaintiffs commence this action against the first defendant as agent of the second defendant for negligence in failing to explain to the deceased the contents of the MRTA policy form before the deceased signed it on 28 July 2003 when DW1 knew that the deceased cannot read, write or speak in English and against the second defendant for failing to pay the insured sum of RM343,676 together with interest and costs.

THE FIRST DEFENDANT'S CASE

[7] The first defendant denies being negligent as alleged by the plaintiffs or if at all the first defendant owed a duty of care to the deceased, the first defendant states that it has fulfilled that duty by ensuring that the deceased understood the contents of the application form for the MRTA policy and by completing the said application form in accordance with the answers and information provided by the deceased.

[8] It is the defendant's case that DW1 assisted the deceased in the said application for the MRTA policy, read out to the deceased the 'Health Declaration' appearing in the MRTA policy application form for the said cover and, upon receiving confirmation from the deceased that the health declaration was correct, told him that he could sign the application form.

[9] If at all the deceased had suffered any loss, the first defendant states that such loss was caused wholly or contributed to substantially by the negligence of the deceased himself.

[10] In signing the health declaration in the MRTA policy application form dated 28 July 2003, and in failing to disclose that he had been diagnosed with and/or had been treated for diabetes when he knew of that fact, the first defendant contents that the deceased had fraudulently failed to disclose and/or misrepresented a material fact.

THE SECOND DEFENDANT'S CASE

[11] When the first plaintiff made a claim on the second defendant, she filled out a form known as the Statement by Deceased's Next-of-Kin. In this Statement of Deceased's Next-of-Kin, the first defendant stated that the deceased had been suffering from diabetes.

[12] The first plaintiff also informed the second defendant that the deceased had been diagnosed as suffering from diabetes by Poliklinik dan Surgeri Serdang. Pursuant to its letter of 6 May 2007, the second defendant wrote to Poliklinik dan Surgeri Serdang requesting specific particulars of the deceased's medical history of diabetes.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

[13] On 14 May 2007, the second defendant was informed by the Poliklinik dan Surgeri Serdang that the deceased had been diagnosed as suffering from diabetes on 16 October 2002 and that the deceased was informed of this diagnosis on the same day itself.

[14] Therefore, according to the second defendant the deceased had failed to declare that he had been diagnosed with and/or treated for diabetes when he knew or ought to have known of such diagnosis and/or treatment.

[15] As such, the second defendant states that the deceased did not disclose a material fact and had misrepresented a material fact or facts and/or had acted fraudulently.

[16] The second defendant contents that the particulars of the fraud committed by the deceased are as follows:

(a) Stating that the deceased had been in a good state of health for the past five (5) years on the date the deceased signed the application form; and/or

(b) Stating that the deceased had not been diagnosed with or treated for diabetes mellitus in the past five (5) years when the deceased had specific knowledge that the deceased had been diagnosed and treated for diabetes mellitus; and/or

(c) Knowingly misrepresenting the fact that the deceased had been diagnosed with and treated for diabetes mellitus; and/or

(d) Actively concealing the fact that the deceased had been diagnosed with and treated for diabetes mellitus; and/or

ISSUES FOR DETERMINATION

[17] Based on the facts of the case, the issues requiring determination by the court are as follows:

(a) Whether there had been no disclosure of a material fact by the deceased; and

(b) Whether the defendants had prove fraud by the deceased

Whether there had been no disclosure of a material fact by the deceased

[18] The plaintiffs content that there was no suppression of a material fact as the deceased was not given the opportunity to disclose his health condition because DW1 did not read out the 'Health Declaration' in the MRTA policy to the deceased.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

[19] In response, learned counsel for the first and second defendants submitted that the deceased had failed to disclose a material fact that he was suffering from diabetes hereby rendering the policy voidable at the instance of the defendants.

[20] It is trite law that the burden of proof is on the insurer to prove non-disclosure of material facts (see *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] MLJ 5; *Azizah bte Abdullah v Arab Malaysian Eagles Sdn Bhd* [1996] 5 MLJ 569).

[21] It is not disputed that the deceased had diabetes since 2002 and had been taking medication for diabetes before the application for the MRTA Policy was made. The facts that has been proven in cross-examination is that the deceased was a careful, prudent man who was worried about his diabetes. PW1 confirmed he took medication and did regular exercise so as not to make his diabetes worse. Further PW1 in cross-examination admitted that the deceased knew he had diabetes since October 2002. This is what PW1 said in evidence:

> Q: I refer you to page 107 of Bundle B. this is a report from Poliklinik and Surgeri Serdang, the clinic which you informed Uni Asia of, stating that Mr. Heng was diagnose with diabetes on 16.10.2002 and that Mr. Heng was informed of the diabetes on the same day. You agree with me that Mr. Heng knew he had diabetes in October 2002?
>
> PW1: Yes.
>
> Q: At page 16 of Bundle B, you informed Uni Asia that the clinic that was consulted in relation to Mr. Heng's diabetes was Poliklinik and Surgeri Serdang, do you agree with me?
>
> PW1: Yes.

[22] It is also trite law that because a contract of insurance is a contract *uberrimae fides* or of the outmost good faith, there is a duty on the person who wants to be insured to disclose all that is relevant to the insurer's decision whether to accept the risk being proposed (see *Goh Chooi Leong v Public Life Assurance Co Ltd*; *Toh Kim Lian & Anor v Asia Insurance Co Ltd* [1996] 1 MLJ 149; *Azizah bt Abdullah v Arab Malaysian Eagles Sdn Bhd* [1996] 5 MLJ 569; *Maxi Development Sdn Bhd & Ors v Allianz General Insurance Malaysia Bhd* [2011] 1 MLJ 654; [2010] 4 AMR 704).

[23] In the case of *Toh Kim Lian & Anor v Asia Insurance Co Ltd* [1996] 1 MLJ 149, the issue before the court was whether there was a non-disclose of

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

material fact by the deceased in that case when he failed to disclose that he suffered from ischemic heart disease, Elizabeth Chapman JC (as she then was) said:

> It is a general principle of insurance law that an insured is under a duty to disclose material facts, and the absence of a proposal form does not modify the assured's duty.
>
> In *Ivamy's General Principles of Insurance Law* (5th Ed) it is stated at p 122:
>
> It is the duty of the proposed assured to disclose to the insurers all material facts within his actual knowledge. The special facts distinguishing the proposed insurance are, as general rule, unknown to the insurers who are not in a position to ascertain them. They lie, for the most part, solely within the knowledge of the proposed assured.

[24] S Santhara Dass, in his book, *Law of Life Insurance in Malaysia*, which was referred to by learned counsel for the first defendant, at p 95 said that the disclosure must be made voluntarily, in the sense that even if the insurer does not ask an appropriate question either in the proposal form or otherwise, the insured is bound to disclose any information which is material or relevant to the risk. He must not wait to be asked. An insured duty to disclose material information to the insurer is a duty which exists independently of any proposal form.

[25] The court also finds that as the deceased had signed the MRTA form, he is bound by the terms and conditions of the form and it is immaterial whether he had read the document or not. In the case of *Lee Teck Seng v Lasman Das Sundra Shah* [2000] 8 CLJ 317, PS Gill J (as he then was) said:

> it is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then to use the words of Lord Denning J (as he then was) in *Curtis v Chemical Cleaning Vbyung Co Ltd* [1951] 1 All ER 631, 'His signature is irrefutable evidence of his assent to the whole contract, including the exempting classes, unless the signature is shown to be obtained by fraud or misrepresentation. Scrutton CJ in *L Estrange v F Graucob Ltd* [1934] 2 KB 394 had this to say:
>
> When a document containing contractual terms is signed then in the absence of fraud, or, I will add misrepresentation, the party signing is bound, and it is wholly immaterial whether he had read the document or not.

[26] The court in *Lee Teck Seng v Lasman Das Saundra Shah* also referred to the case of *Saunders v Anglia Building Society* [1971] AC 1004 where the House of Lords held that a person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

prudence to take care what he signs, which it neglected, prevents him from denying his liability under the document according to its tenor.

[27] An insured's duty to disclose material information to an insurer constitutes a duty which exists independently of any proposal form. In *Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330 (Singapore case), an insured failed to disclose to an insurer that he had released a third party from the obligation to repair the insured property. The court decided that the fact was material and ought to have been disclosed even though the insurer did not ask for the information. S Rajendran J said at p 335:

> An insurance contract is a contract uberrima fides. As such it can be avoided not only for misrepresentation of material facts but also for non-disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or asked any other questions by the insurer. The fact that in this case the plaintiffs did not specifically ask for the terms of the lease agreement or ask for a proposal form to be completed prior to the issue of the policy does not affect the obligation on the defendants to disclosure the terms of the lease agreement where those terms are material.

[28] The court finds that the mere fact that an insurer may require an insured to answer a question pertaining to the information in a proposal form does not relieve the insured of his duty of disclosure. In *United Oriental Assurance Sdn Bhd v WM Mazzarol* [1984] 1 MLJ 260, a proposer who wanted to insure a vessel was asked certain questions in the proposal form as to whether other vessels belonging to the proposer had been involved in accidents. The Federal Court decided, inter alia, that the fact that there were no questions in the proposal specifically directed at the insured vessel did not render information of accidents involving the insured vessel immaterial. Salleh Abbas CJ (Malaya) (as he then was) delivering the judgment of the court said at p 262:

> There is no presumption in insurance law that matters not dealt with in a proposal form are not material. … Thus it would appear that despite the fact that the respondent had correctly answered the questions in the proposal form he still had to disclose the earlier mishap to the appellant company.

[29] In reaching my judgment on this issue, I have followed the principles in the cases cited above. Thus, in my judgment, the duty rested on the plaintiff, when he signed the MRTA form for a policy cover, he has to disclose his diabetes. Based on the facts of this case, I do not think that the fact that DW1 did not specifically asked him whether he had diabetes modifies in any degree the duty of disclosure on the deceased. Thus, I am of the view that the deceased had failed to disclose a material fact to the defendants.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

[30] However in this present case, as the policy has been in force for more than two years, s 147(4) of the Insurance Act 1963 applies to this case. Therefore, the defendants should be precluded from contesting the validity of the policy on the ground of non-disclosure of material facts unless fraud is proven under the second limb of s 147(4) of the Act (see *Tan Guat Lan & Anor v Aetna Universal Insurance Sdn Bhd* [2003] 1 MLJ 430; [2003] 5 CLJ 384; *Malaysia Assurance Alliance Bhd v Chong Nyuk Lan (Administrator of the Estate of Liew Kin On, deceased)* [2002] 6 MLJ 648; [2003] 5 CLJ 245).

Whether there is fraud on the part of the deceased

[31] The next issue that the court has to consider is whether the defendants had proved fraud on the part of the deceased.

[32] In this case, the court agrees with the submission of learned counsel for the first defendant that the question of whether or not DW1 has breached any duty of care is irrelevant and immaterial. In this case since more than two years have elapsed from the time the MRTA policy in question came into effect, the second defendant would have to prove fraud on the part of the deceased in any event. Thus, if any payment is now ordered to be paid out under the MRTA policy, it will be because fraud has not been proved on the part of the deceased, not because DW1 has breached any duty.

[33] The situation might have been different if the deceased had passed away before the MRTA policy had been in force for two years. In such a situation, the plaintiffs' claim would rest on whether or not the second defendant can show any non-disclosure of a material fact.

[34] Learned counsel for the plaintiff further submit that there is no fraud committed by the defendant in this case. He argued that DW1 used the words 'sickness or illness' when he asked the deceased about his health condition. The plaintiff's position is that diabetes is a disease and not a sickness or illness. According to learned counsel for the plaintiffs, if the word diabetes is the same as diabetes mellitus, why not use the word diabetes instead of diabetes mellitus in the MRTA form. For a layman, diabetes mellitus seems to connote diabetes of a more serious nature. Hence he submits that there is no fraud committed by the defendant.

[35] On this issue, the court finds that fraud is defines under s 17 of the Contracts Act 1950 as follows:

17. 'Fraud'.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract —

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other fitted to deceive; and

(e) any such or omission as the law specially declares to be fraudulent.

[36] The Federal Court in *Ang Hiok Seng v Yim Yut Kiu* [1997] 1 CLJ 497 referred to *Osborne's Concise Law Dictionary*, (8th Ed) p 152 which defines fraud as follows:

The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party.

Conspiracy to defraud remains a common law offence the mens rea of which has been defined as 'to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled,' per Lord Diplock in *R v Scott* [1975] AC 814. Certain other frauds are likewise criminal offences, eg under the Prevention of Fraud (Investments) Act 1958.

[37] Related to this is the issue of the standard of proof, whether the defendant is required to prove its case on a balance of probabilities or beyond reasonable doubt. It is the plaintiffs' submission that the standard is one that is beyond reasonable doubt. In *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 AMR 553 ; [2005] 3 CLJ 229, the Federal Court had occasion to examine whether the standard of proving on a balance of probabilities for cases of forgery as decided in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 AMR 665; [2001] 1 MLJ 241 ; [2001] 2 CLJ 133 applied in cases of fraud. The Federal Court declined to follow that standard preferring instead to adhere to the test long applied since the decision in *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174. In the Federal Court's view the correct test or standard of proof for cases of fraud in civil proceedings is proof beyond reasonable doubt. This decision was recently applied by the Court of Appeal in *Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 2 AMR 407; [2008] 3 CLJ 692; *Formosa Resort Properties Sdn Bhd v*

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

Bank Bumiputra Malaysia Bhd [2009] 5 AMR 488 and *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 AMR 329; [2007] 2 MLJ 301; [2007] 2 CLJ 1.

[38] Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34; [1985] 1 LNS 134 at p 38 (SC); *Lee Cheong Fah v Soo Man Yoh* [1996] 2 MLJ 627; [1996] 2 BLJ 356; *Goh Hooi Yin v Lim Teong Ghee* [1990] 2 CLJ 48 (Rep).

[39] The Federal Court in the case of *Ang Hiok Seng v Yim Yut Kiu* states that it is well established law that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely.

[40] In allowing the appeal in *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21 the Federal Court reversed the judgment of the High Court of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent.

[41] Having considered the law and its principles in the cases above, what remains to be determined is whether the defendants have proved beyond reasonable doubt that the deceased had committed fraud. The court recalls, the relevant evidence adduced are as follows:

(a) When the deceased signed the MRTA form on 28 July 2003 he knew that he had diabetes. Based on the medical report by Poliklinik and Surgeri Serdang, the deceased was diagnosed with diabetes on 10 October 2002 and he was told of it on the same day (see exh D31, p 106 of bundle B). PW1 admitted during cross-examination that the deceased knew he had diabetes. Furthermore when PW1 made the claim against the second defendant, she had provided in the Statement of Deceased's Next-of–Kin to Uni Asia (exh P10 at p 15, bundle B) that the deceased had diabetes for three (3) years before he died.

(b) Before the deceased signed the blank MRTA form, DW1 told the deceased that this was an application form for MRTA policy.

(c) DW1 asked the deceased if he had any 'sickness or illness' and he replied 'no'.

(d) DW1 did not ask whether the deceased had diabetes or other disease.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

(e) The deceased never told DW1 that he had diabetes or any other illness.

(f) The deceased signed blank MRTA form after DW1 told him that the insurance company would not pay out any proceeds if there was anything untrue in the form.

(g) PW1 was present when the deceased signed the blank form on 28 July 2003. It is not disputed between the parties that PW1 and her husband cannot read, write and understand English.

(h) DW1 confirmed in cross-examination that she spoke in Cantonese dialect because the deceased and PW1 are not well versed in English. She also confirmed in cross-examination that the deceased and his wife cannot read, write or speak English. DW1 also confirmed that she cannot converse well in Cantonese to translate the form which is in English to Cantonese to him.

(i) DW1 confirmed in cross-examination that she did not explain the 'Health Declaration' in the MRTA policy form to the deceased. In this respect she confirmed that it is important that the 'Health Declaration' in the MRTA form be asked and explained to the deceased.

(j) This is the first time that the deceased signed an MRTA form.

(k) DW1 confirmed that from his appearance the deceased was healthy.

[42] The court finds that based on the totality of the evidence adduced and the authorities above, I am not satisfied beyond reasonable doubt that the deceased had committed fraud.

[43] In this present case, even though the deceased knew that he was signing an MRTA form, however the detail contents of the form in particular the warning was not read and explained to him. As the deceased and the first plaintiff cannot read, write and not versed in English, the court finds that the deceased did not understand the contents of the form with regard to the declaration that he is in a good state of health and in the last five years he had never been diagnosed with or treated or tested with any chronic illness which, inter alia, includes diabetes mellitus. In this regards, DW1 admitted in cross-examination that it is important for the deceased to be asked or explained regarding the 'Health Declaration in the MRTA form since it was blank and she needed an answer with regard to this matter.

[44] Further the court finds that DW1 did not specifically ask the deceased whether he has diabetes. Instead it is not disputed that DW1 asked the deceased whether 'Do you have any illness or sickness' and he replied 'no'. As such, I am of the view that the word 'illness' or 'sickness' is ambiguous, lacking specifics and indeed not self-explanatory.

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Fri Jul 1 11:46:19 2011
//caseml/case/mlj/2011_008_mlj_556

[45] Since the questions asked by DW1 is ambiguous, such ambiguity must be resolved in favour of the plaintiffs. Salleh Abbas CJ (Malaya) (as he then was) in the Federal Court case of *The 'Melanie' United Oriental Assurance Sdn Bhd Kuantan v W M Mazzarol* [1984] 1 MLJ 260 held as follows:

> In our judgment the omission by the respondent to state the earlier mishap in the proposal form was therefore not his fault but that of the appellant company themselves for framing ambiguous questions. Such ambiguity must be resolved, according to the contra proferentum rule in favour of the respondent. (*Ivamy Marine Insurance*, (3rd Ed) p 358).

CONCLUSION

[46] For the reasons set-out above, I find that the second defendant is not entitled to avoid the policy and the court allows the plaintiffs' claim against the second defendant with costs. Accordingly, the court dismiss the plaintiff's claim against the first defendant. The first defendant is to bear its own costs.

Plaintiff's claim against second defendant allowed with costs and plaintiff's claim against first defendant dismissed with costs.

Reported by Kohila Nesan